United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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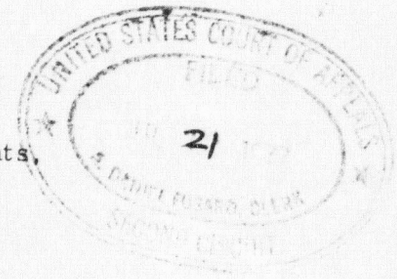
WITH PROOF
OF SERVICE

77-7209

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



IRVING ELLENTUCK et al.,

Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN et al.,

Defendants-Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES, RICHMOND HILL SAVINGS BANK AND JULIUS GRANIRER

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

IRVING ELLENTUCK et al.,

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Defendants-Appellees

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BRIEF OF DEFENDANTS-APPELLES,
RICHMOND HILL SAVINGS BANK AND
JULIUS GRANIRER

STATEMENT

In this class action, brought by them pursuant to 42 U.S.C. sec. 1983 and sec. 1985, plaintiffs appeal from an order and judgment of the District Court, Southern District of New York (Hon. Lawrence W. Pierce, D.J.) which dismissed their complaint on defendants' motions therefor and on plaintiffs' motion for summary judgment pursuant to Rule 56, F.R.C.P.

Having before it the pertinent facts as contained in the affidavit submitted in support of plaintiffs; motion for summary judgment, and those in support of defendants' motions for dismissal of the complaint and in opposition to summary judgment, the court below granted judgment dismissing the complaint on the ground that plaintiffs are barred from this action by res judicata and collateral estoppel.

The issues are whether the plaintiffs are barred from this action by the principles of res judicata and collateral estoppel, and whether the second alleged cause of action in the amended complaint sufficiently states a cause of action.

FACTS

Having invoked and being disappointed by the adjudications of the state courts of New York adverse to their claims, among others, that their rights under the Constitution of the United States had been violated by a conspiracy to discriminate against them, plaintiffs brought this class action, pursuant to 42 U.S.C. sec. 1983 and sec. 1985, as representatives of an alleged class of property owners who allege depreciation in the value and, therefore, damage to their homes as a result of the conversion by defendants, Kimballs, of a three-story building, previously occupied as a rooming house and home for homeless and/or aged women, from a Class "B" multiple dwelling to a Class "A" multiple dwelling.

The manifest purpose and object of this action are to review in the federal courts the identical issues presented by plaintiffs to, or capable of having been presented by them to, and adjudicated by the Appellate Division of the New York Supreme Court, Second Judicial Department, and the New York Court of Appeals, both of which said forums were selected by plaintiffs in which to air their grievances and to present for adjudication the issues raised by their claims and contentions herein. For the relief sought by plaintiffs, in their second alleged

cause of action herein against defendants, Richmond Hill Savings Bank (hereinafter referred to as Bank) and Julius Granirer, et al, is, in addition to damages, a judgment declaring the nullity of the determination of the Board of Standards and Appeals (hereinafter referred to as BSA) which was unanimously "confirmed" by said Appellate Division which "dismissed on the merits" plaintiffs' petition, pursuant to Article 78 of the New York Civil Practice Law & Rules (Ellentuck v. Klein, 51 A.D.2d 964, 380 N.Y.S.2d 327). And that determination now stands as a conclusively binding adjudication and estoppel upon and against plaintiffs since, on motion of the respondents in that action, plaintiffs' appeal, as of right on constitutional grounds, to the New York Court of Appeals was dismissed on April 6,1976, "upon the ground that no substantial constitutional question is directly involved" (39 N.Y.2d 743), and the same court on May 6, 1976, denied plaintiffs' motion for leave to appeal to it on the self-same constitutional grounds (39 N.Y.2d 707). Finally, by its decision of September 8, 1976, on plaintiffs' second motion for leave to appeal to it from the aforesaid determination of the Appellate Division, wherein plaintiffs also asserted the nullity of that determination because of the participation therein of Mr. Justice Latham, the Court of Appeals denied that motion, sua sponte, again holding that "no substantial constitutional question is directly involved (40 N.Y.2d 844)(SA-26-28). As the record unquestionably establishes, plaintiffs have now had five bites of the apple in the New York Appellate Division and Court of Appeals in which their

claims and contentions of the denial to them of their said constitutional rights have been wholly and unanimously rejected as meritless.

Instead of applying for certiorari to the U.S. Supreme Court for a review by it of the aforesaid determinations, plaintiffs waived their right to do so and chose the illicit device of this action as a vehicle and means of, in effect, appealing from said determinations of the New York courts in which they elected to seek the identical remedies to which they claim they are constitutionally entitled and of which they claim to have been deprived.

Neither defendant, Bank, nor defendant, Granirer, were parties, directly or indirectly, or by intervention or otherwise, to the proceeding before the BSA or the two actions (the first, to revoke the permit issued to defendants, Kimball (amended complaint, ¶41) and the second, to annul the determination of the BSA, (amended complaint, ¶137) brought by the plaintiffs in the New York courts (SA-4,17). Nevertheless, said defendants have been accused as conspirators in a conspiracy to discriminate against the plaintiffs and to violate their constitutional and civil rights. (Complaint ¶s 86, 87).

Defendant Bank is named as a conspirator on the sole and exclusive ground that, in its own self-interest it wrote a letter to the BSA, on January 27, 1975 (plaintiffs' 119A), in which the Bank informed the BSA that it had made a $46,000.00 loan to defendant, Kimball Construction Co. Inc., to finance Kimball's purchase, contracted

for on March 29, 1972, of the property that was the subject of the proceeding then before the BSA, the payment of which said loan was secured by a purchase-money mortgage, maturing in 1987, then held by the Bank. Said mortgage loan was closed on June 1, 1972, more than 6 months prior to the commencement by plaintiffs, in December, 1972, of their action in the New York Supreme Court (alleged in the first cause of action herein) to revoke the building permit granted to Kimball to convert the building to a Class "A" multiple dwelling, and some 2 1/2 years prior to the commencement of the alleged conspiracy (complaint ¶86) and the commencement of the proceeding had before the BSA for a variance (SA-8).

Said letter further advised the BSA that, in approving and making said mortgage loan, the Bank, without any contrary knowledge or notice, had acted innocently and in good faith reliance upon a search and report of its title insurance company (SA-11,29) that said property was "classified in Department of Buildings as a Heretofore converted Class B Rooming House (28 Rooms). No Certificate of Occupancy required - None issued". Nevertheless, as said letter further advised, the Bank had withheld action on the application of said defendant, Kimball, for an additional loan of some $31,000.00, to finance the conversion by it of said property to a Class A multiple dwelling, unless and until the then pending action of the plaintiffs to revoke the building permit for said conversion had been disposed of, and unless and until it was furnished with a "legal Certificate of Occupany and the required

governmental certificates".

In view of its innocence of any wrongdoing whatsoever in having made said $46,000.00 purchase-money mortgage loan - in fact, it had refused to favor and succor defendant, Kimball, by financing said conversion of the property - the Bank's said letter submitted for the consideration of the BSA the fact that the security of its said mortgage would be substantially impaired were the then standing building to be demolished or otherwise rendered unuseable because of the financial incapability of defendant, Kimball, to reconvert it. In short, nowhere in said letter is the Bank "asking for a favorable consideration of the variance" sought by defendant, Kimball, as is incorrectly asserted on page 22 of plaintiffs' brief. And, in submitting for the consideration of the BSA the substantial damage it would suffer to its mortgage security, the Bank sought only to protect its own interests which it had every moral and legal right and obligation to do, even as had the "83 residents and owners - - - (who) filed written objections to the granting of the variance with the Board of Standards and Appeals" along with "about another 69 owners" (plaintiffs' 91A, ¶35), who, in so doing, also did what they considered advisable to protect their interests.

The accusation of defendant, Granirer, as a conspirator is fraught with uncertainty and ambivalence in that the fraud with which he is charged in the complaint (¶s 98, 103, 105-106), was abandoned by the plaintiffs on their motion for summary judgment, instead of

which plaintiffs now irrelevantly argue, as they did below on their motion for summary judgment, that it was wrongful and in violation of the New York Banking Law for Granirer, in his admitted capacity as attorney for the Bank (complaint p. 80) to have represented both the Bank and defendant, Kimball Construction Co., on the latter's purchase of the subject property and the closing of the aforesaid purchase-money mortgage, with the consent of both the Bank and Kimball, in the Spring of 1972, some 2 1/2 years prior to the time when the alleged conspiracy is stated to have first come into existence (complaint ¶86).

Defendant, Granirer, an attorney of unimpeachable character, reputation and probity, has been engaged in the practice of law for more than 50 years in the state courts of New York, and for more than 40 years last past has been admitted to practice in this court as well as in the United States District Courts for the Eastern and Southern Districts of New York, the United States Court for Customs and Appeals, and the United States Supreme Court. In addition, he has actively engaged in many civic as well as banking and Bar Association activities (SA-1 - SA-3).

Standing undenied and uncontradicated are Granirer's sworn statements that:

1. He did not represent or otherwise act as attorney for defendants, Kimballs, in the proceeding had by them before the BSA, and that he did not in any manner participate therein (SA-4 - SA-5);

2. He never was advised and never knew what statements of costs and expenditures were to be or were submitted by defendants, Kimball, or their attorney, Sheldon Lobel, to the BSA;

3. He never approved the submission by defendants, Kimball, or anyone else, to the BSA of any statements of costs or expenditures;

4. Whatever was done by defendants, Kimballs, with regard to their submissions to the BSA, was done by them on their own initiative or by and with the consent of their said attorney;

5. The costs and expenditures of defendants, Kimball, in connection with the alteration of said property were never a matter of concern to Granirer as he never was privy thereto.

With respect to the application by defendant, Kimball Construction Co., to the Bank for an additional loan of some $31,000.00 for the purpose of financing its conversion of the property to a Class A multiple dwelling (Bank's aforesaid letter of January 27, 1975, to BSA), Granirer furnished to them a statement (plaintiffs' 122A) of the estimated "anticipated expenses" thereof. That statement was prepared by Granirer soley for and was furnished solely to defendants, Kimballs, in accordance with Granirer's office practice; it was not furnished by him to the BSA (SA-5). Those estimated expenses were essentially correct and sound, to wit: the estimated mortgage tax of $930.00 would actually have amounted to $927.50, pursuant to statute; the estimated $225.00 premium for the title insurance would actually have amounted to $262.50, and now would amount to $307.00; the

$22.50 charge for survey inspection conformed to the Bank's charge therefor; and the legal fees were those that would have been regularly charged by him to the Bank and to any other person for his legal services in that transaction. In sum, had said $75,000.00 mortgage loan closed, said estimate of "anticipated expenses" would actually have been charged to and paid in substance, by defendants, Kimballs. Hence, said estimate of said expenses was neither exaggerated, false nor fraudulent (SA-5).

Not only is it an undenied record fact, but it is an undeniable fact that, since neither the plaintiffs nor their attorney were present when said statement of "anticipated expenses" was furnished by Granirer to the Kimballs and, since neither the plaintiffs nor their attorney ever asked Granirer the purpose for which he furnished said statement to Kimballs, the sole and exclusive purpose of which, in accordance with Granirer's practice, was to inform them of their estimated expenses attendant upon the additional mortgage loan (SA-4 - SA-5), the factually unsupported assertion it was given by Granirer to aid Kimballs' variance application to the BSA, is purely a figment of an uninhibited imagination.

Admittedly, defendant Granirer ordered and obtained the aforesaid title insurance company search and report, in reliance upon the accuracy thereof and upon the basis of which he approved the closing of the aforesaid $46,000.00 purchase-money mortgage loan, especially since he had no contrary information from Kimballs' seller or attorney (SA-11).

Admittedly, defendant Granirer represented both the Kimballs and the Bank upon the closing of said mortgage loan with the consent of both said parties, absent as their was and is no legal or ethical interdiction against his having done so (p. 8-10). And no claim or suggestion is made by plaintiff that any prejudice resulted to either party to that transaction or to the plaintiffs in consequence of Granirer's representation of both the Kimballs and the Bank. Nor is there a suggestion aywhere to be found in the record that said mortgage loan was improvident, improper or irregular when it was made on June 1, 1972, to finance the purchase by Kimball of the mortgage property.

In sum, there is not to be found in the record an iota of evidentiary facts to support or justify the accusations of conspiratorial wrongdoing made by the plaintiffs against defendants, Bank and Granirer. Nor is there in the record a scintilla of evidence that said defendants did anything whatsoever to discriminate against the plaintiffs or plaintiffs' alleged class in favor of defendants, Kimballs.

POINT I

THE COURT BELOW CORRECTLY DECIDED AND ADJUDGED THAT THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND ABSENTION FROM AND NONINTERVENTION IN THE DETERMINATION OF THE NEW YORK STATE COURTS ARE CONCLUSIVE AND PRECLUSIVE OF THIS ACTION.

The essence of the complaint alleged, in its second cause of

action, against defendants, Bank and Granirer, is that they conspired with defendants, Kimballs, and the defendants, Commissioners of the BSA, to deprive plaintiffs of their constitutional right by discriminating against plaintiffs and favoring defendants, Kimball, in the proceeding had before the BSA in respect to the variance sought by the Kimballs (complaint ¶¶ 86-87, 135). On the basis thereof plaintiffs demand judgment against said defendants declaring the determination of the BSA null and void, and for money damages (complaint, plaintiffs' 38A-39A).

The identical claims, contentions and issues, raised by the allegations in plaintiffs' second cause of action, were presented and adjudicated in the judicial proceeding brought and had by plaintiffs in the Supreme Court of the State of New York Second Judicial Department pursuant to Article 78 of the New York Civil Practice Law & Rules, for a review and nullification of the determination of the BSA granting the variance applied for by defendants, Kimballs. Said Appellate Division unanimously confirmed the determination of the BSA and finally "dismissed on the merits" plaintiffs said proceeding (Ellentudk v. Klein, 51 A.D.2d 964, 380 N.Y.S. 2d 327) and, upon "reconsideration", denied plaintiffs' motion to nullify its said adjudication because of Justice Latham's participation (Plaintiffs' 64A).

The New York Court of Appeals thrice considered and rejected plaintiffs' efforts to appeal to it on constitutional grounds from the final order and adjudication of the Appellate Division aforesaid. First,

by its order of April 6, 1976, it granted respondents' motion to dismiss plaintiffs' appeal, taken by them as of right on constitutional grounds "on the (stated) ground that no substantial constitutional question is directly involved." (Ellentuck v. Klein, 39 N.Y.2d 743) Following that determination, said court, on May 6, 1976, denied plaintiffs' motiom for leave to appeal to it on constitutional grounds (Ellentuck v. Klein, 39 N.Y.2d 707), and thereafter, by its order of September 8, 1976, said court, "sua sponte" again denied plaintiffs' motion for leave to appeal, from said order of said Appellate Division, on constitutional grounds and on the ground said order of the Appellate Division was void because of Justice Latham's participation, "upon the (stated) ground no substantial constitutional question is directly involved (Ellentuck v. Klein, 40 N.Y.2d 844).

That those adjudications are conclusive upon plaintiffs, as constituting a complete res judicata and collateral estoppel in respect of all of the issues, matters and things in plaintiffs' said second cause of action, and are preclusive of the maintenance of said cause of action, is settled by the law prevailing in both the federal and state jurisdictions. In S.T.Grand, Inc. v. City of New York, 32 N.Y.2d 300, 304, Jasen, J., speaking for unanimous court with respect to collateral estoppel, held:

> "Since the ratio decidendi of the Schlindler opinion, mutuality of estoppel, has been expressly abandoned, Schindler and its progeny are no longer viable. (Cf. Vavolizza v. Krieger, 39 A.D.2d 466, 336 N.Y.S.2d 748.)
>
> "In Schwartz v. Public Administrator of

> County of Bronx (supra), we set forth the present state of the doctrine of collateral estoppel: 'New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling' (at p. 71, 298 N.Y.S.2d at p. 960, 246 N.E.2d at p. 729)."

Illustrative is Albero v. State of New York, 26 N.Y.2d 630, in which the court unanimously affirmed an order of the Appellate Division dismissing plaintiff's complaint, for damages suffered in an automobile accident, on the specific ground of res judicata in that his action was barred by a federal court judgment obtained against him by third parties injured in said accident.

It is immaterial that the aforesaid adjudication of the issues by the Court of Appeals were made on motion. For, as was held in Vavolizza v. Krieger, 33 N.Y.2d 351, 356, Gabrielli, J., speaking for an unanimous court, after noting "a prior adjudication on a motion brought within a prior (federal court) proceeding in which issues identical to those now raised were decided", went on to hold:

> "There is, moreover, cogent precedent for the proposition that an order made upon a motion provides such a 'judgment' as will bar re-litigation under the doctrines of res judicata or collateral estoppel so long as the requisites of identity of issue and opportunity to contest are present (Citations)."

The same principle of res judicata and collateral estoppel

obtain in the federal jurisdiction. In Sanchez v. Caribbean Carriers Ltd., etc., Docket No. 76-7213, decided March 30, 1977, this court, in discussing res judicata, unanimously held (p. 2572-2573):

> "The doctrine of res judicata is primarily grounded on a public policy determination which 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties ' Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525 (1931)."

And at page 2573 - 2574:

> "The res judicata doctrine, however, not only binds the parties and their privies as to grounds or issues actually litigated, but also 'as to any other admissible matter which might have been offered for that purpose.' (citing cases)."

Those holdings are fully supported by Judice v Vail, decided March 22, 1977, - U.S. - , 51 L.Ed. 2d 376, in which the complaint, in an action brought pursuant to 42 U.S.C. §1983, was dismissed upon the holding that where, as herein, the plaintiffs "had an opportunity to present their federal claims in the state court proceedings" (p. 385) they are barred by res judicata and collateral estoppel from maintaining this action.

Indistinguishable in principle from and determinative of the case at bar is Mitchell v. National Broadcasting Co., Docket No. 76-7376, decided by this court on April 6, 1977. For the same contentions and arguments of the plaintiffs in their brief herein were, in principle, answered and rejected therein as meritless.

Plaintiffs' contention that the claim alleged in plaintiffs' second cause of action herein is not the same as that alleged in their Article 78 proceeding petition for review by the Appellate Division of the New York Supreme Court of the determination of the BSA, is incorrect and absurd in light of the similarity, in substance, of both instruments. Indeed said petition squarely presented to said court plaintiffs claim that their "rights" were "impaired, impeded and defeated" by the determination of the BSA (Plaintiffs 95A).

Despite the four-square adjudications of the state courts that plaintiffs' rights, including their constitutional rights, have not been denied them, they, in an apparent effort to evade or circumvent those adjudications, now claim a conspiracy by defendants, Bank and Granirer, with defendants, Kimballs, and defendants, Commissioners of BSA, to deny them the rights to which, as determined by said state court adjudications, they were not denied.

Defendant Bank, they claim, is culpable as a conspirator because it wrote its above-discussed letter of January 27, 1975, to the BSA, advising the Bank's holding of a $46,000.00 purchase-money mortgage it accepted on June 1, 1972, some 2 1/2 years prior to the inception of the alleged conspiracy in the latter part of October, 1974, when defendants, Kimballs, applied to the BSA for a variance. To claim that letter was, per se, a conspiratorial act is as as absurd as claiming that the 152 owners who filed "written objections" with the BSA to the variance sought by defendants, Kimballs, did so as conspirators in a conspiracy to impair or destroy the security of the Bank's said

mortgage.

It is also manifest that neither the Appellate Division nor the New York Court of Appeals deemed that letter to have had any materiality in respect to the determination by the BSA when that letter was necessarily considered by those courts upon plaintiffs' aforesaid motions to nullify the initial adjudication of the Appellate Division because of the participation therein of Justice Latham, a trustee of the Bank. The effect of the denials of said motion was a necessary finding and determination by both said state courts that the Bank's said letter was as guileless and free of anything wrongful in the context of the proceeding before the BSA and the subsequent Article 78 proceeding, as was Justice Latham's participation in the initial determination by the Appellate Division of the Article 78 proceeding.

The naming of defendant, Granirer, as a conspirator was clearly sired by mischief, borne of malice and nourished by spite. For that claim of the plaintiffs is completely and absolutely irrelevant and immaterial to either the proceeding before the BSA or the subsequent judicial proceeding initated and prosecuted by plaintiffs.

The predicate of said claim is that Granirer, a trustee of and also the attorney for the Bank, "acted on the sale of the premises to Kimball and the granting and execution of the purchase money mortgage, both as attorney for the bank and the borrower (Kimball) from the bank" (Brief, p. 22). Carefully omitted from that statement is the fact that that occurred on June 1, 1972, some 2 1/2 years prior to

the alleged conspiracy. Nor does plaintiffs' brief inform the Court that the undenied record fact is that Granirer so acted with the consent of both parties to that transaction.

Neither by statute nor in its case law is or was there any proscription of Granirer from having acted as attorney for both the Bank and its borrower, Kimballs, upon the closing of said purchase-money mortgage loan. To the contrary, Banking Law §249, subd. 3, cited and relief upon by plaintiffs (brief p. 23), but not disclosed by them, is that it expressly excepts from the prohibition of a trustee from receiving "any pay or emolument for any services rendered to the savings bank", and expressly authorized and permitted Granirer to be compensated by Bank for his legal services to it, and by the "borrower" Kimball for his legal services to Kimball. And, as he acted as attorney for both with the consent of both, it was lawfully permissable to have done so.

Kelly v. Greason, 23 N.Y.2d 368, 376

In Butcher v. Janssen, 137 Misc. 42, 242 N.Y.S. 643, the Appellate Term of the New York Supreme Court held that the attorney for a savings bank was authorized by Banking Law §265, subd. 3 (the predecessor of §249, subd. 3) to recover from a borrower from the Bank the reasonable value of the attorney's services to the borrower in connection with a loan made by the bank to a borrower.

Nor was Granirer prohibited by professional ethics from having acted for both the Bank and Kimballs. Disciplinary Rule 5-105(c)

of the Code of Professional Responsibility, adopted by the American Bar Association in place of the Cannons of Professional Ethics, and by the New York State Bar Association in 1970 (McKinney's Judiciary Law Book 29 Appendix), provides that a lawyer may represent multiple clients "if each consents to the representation after full disclosure - - - ".

Accordingly, in its opinion No. 438, dated July 19, 1976, the Committee on Professional Ethics of the New York State Bar Assocation stated:

> "The attorney for the lending institution may represent both the mortgagee and the mortgagor only if the requirements of DR 5-105(C) are met. If such multiple representation is to occur, there must be express consent of all concerned following full disclosure of relevant facts. ABA Inf. 837 (1965); ABA Inf. 643 (1963); N.Y. State 162 (1970); N.Y. State 199 (1971); N.Y. County 615 (1973). Cf., N.Y. State 351 (1974) See also, DR 5-105(D) and N.Y. State 426 (1976)."

In Matter of Duffy, 19 A.D. 2d 177, 242 N.Y.S.2d 665, 667, it was held:

> "The Canons of Professional Ethics of the American Bar Association, adopted by the New York State Bar Association in 1909, '(w)hile not possessing the force and effect of statutes, *** have come to be recognized by the Bench and Bar as establishing wholesome standards for professional conduct' (Matter of Connelly, etc., 18 A D.2d 466, 469, 240 N.Y.S.2d 126, 129) and serve 'as rules of conduct for attorneys in our courts' (Erie County Water Authority v. Western New York Water Co., 304 N.Y. 342, 349, 107 N.E. 2d 479, 482, cert. den. 344 U.S. 892, 73 S.Ct. 211, 97 L. Ed. 690)."

Suffice it to say the statement of estimated "anticipated expenses" of the additional loan sought by Kimball, furnished by Granirer

to Kimball, is as irrelevant as the unfounded assertion by plaintiffs of Granirer's violation of the Banking Law. Assuming, arguendo, that any of said conduct constituted "misfeasance" on the part of the Bank and Granirer that would be a matter solely for the concern of the New York Banking Department and within its competence to correct.

cf. N.Y. Banking Law §14, sub 1(o)-(r), §41.

More to the point is that that alleged violation of the Banking Law and the submission by Kimballs of Granirer's said statement to the BSA was known to plaintiffs when they instituted their Article 78 proceeding. Said statement was part of the record in both said proceedings, as was the Bank's letter of January 27, 1975. And the recording of the deed and the purchase-money mortgage disclosed of record that Granirer had acted for both the Bank and Kimball. Whether or not plaintiffs addressed themselves in the state court litigation to the issues with regard to those matters is irrelevant and immaterial since they had the "opportunity" of doing so. Hence, they are now barred from doing so in this action.

Judice v. Vail - U.S. - , 51 L. Ed.2d 376.

Plaintiffs had the choice of asserting their present attack upon the determination of the BSA in an action in the federal court but, in lieu thereof, chose the Article 78 proceeding in the state court with the result that they are barred by res judicata from now asserting their claims in this action.

Mitchell v. National Broadcasting Co. supra, pp. 2735-2736, 2737.

Tang. v. Appellate Division of New York Supreme Court, etc., 487 F. 2d 138 (2d Cir.,), cert. den. 416 U.S.906

At page 384 of Judice v. Vail, supra, the court spoke to the doctrine of "comity, that is, a respect for state functions - - - and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Accordingly, the court squarely held that where as herein plaintiffs have had their full day in court and the "opportunity" to have presented their now asserted federal claims in the state court proceeding chosed by them, the federal court should abstain from further intervention.

In sum, the plaintiffs, as they had the right to do and should have done, could have sought vindication of their alleged constitutional rights by appeal of the state court determination to the U.S. Supreme Court (Louis Ender, Inc. v. General Foods Corp., 467 F.2d 327, 332 2d cir.), with the result that the state court adjudications are now required to be fully respected by the federal courts as final and conclusive even though error may have been made therein.

Mitchell v. National Broadcasting Co., supra, p. 2728-2729.

Rooker v. Fidelity Trust Co., 263 U.S. 413, 417.

POINT II

THE SECOND ALLEGED CAUSE OF ACTION IN THE COMPLAINT IS INSUFFICIENT ON ITS FACE AS A MATTER OF LAW

The total lack of merit in this alleged class action against defendants, Bank and Granirer, as alleged conspirators to deprive plaintiffs of their constitutional and civil rights, is further evident

in the patent insufficiency of the alleged second cause of action in their amended complaint. For said cause of action fails to rise to the minimum standard of a complaint grounded on 42 U.S.C., §1983 and §1985, in utter disregard by plaintiffs' attorney of the admonition given her by this court in Powell v. Workmen's Compensation Board, 327 Fed. 131, in which it was held (p. 137):

> "A complaint in a case like this must set forth facts showing some intentional and purposeful deprivation of constitutional rights Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). This complaint does contain some general allegations, framed in broad language closely paralleling that used in Sections 1983 and 1985 (3), that defendants successfully conspired to deprive plaintiff of his rights But plaintiff was bound to do more than merely state vague and conclusionary allegations respecting the existence of a conspiracy. It was incumbent upon him to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy (citing cases) This plaintiff has not done. The allegations contained in the complaint indicate no more than the action of several interested parties to a workmen's compensation proceeding, who sought vigorously to protect their own interests, coupled with the normal administrative processes of adjudication and appeal. Indeed, were we to hold this complaint sufficient, we would be inviting every party to a state proceeding angered at delay to file a complaint in this court reciting the history of his state case and concluding with a general allegation of conspiracy. Moreover, with respect to plaintiff's claimed deprivation of equal protection, he has not even alleged any discrimination essential to a denial of this right Compare Oklahoma High School Athletic Ass'n. v. Bray, 321 F. 2d 269, 273 n. 3 (10 Cir 1963) (no race discrimination alleged), with Lee v Hodges, supra, 321 F. 2nd at 485-486 (4 Cir. 1963) (invidious discrimination alleged). For all of these reasons we affirm, though on grounds different from those relied on by the court below, the dismissal of the complaint."

It is now settled beyond any question that the sine qua non of said cause of action is a factual statement establishing the existence of a purposeful intent of defendants to discriminate against plaintiffs, i.e., "there must be some racial or perhaps otherwise class-based discriminatory animus behind the conspirators' action" as the Civil Rights Act is "not intended to apply to all tortious conspiratorial interferences with the rights of others."

Griffin v. Breckenridge, 493 U.S. 88, 101-102.

In Arnold v. Tiffany, 487 F. 2d 216, 217, the court approved the following meaning and definition of a "class-based, invidiously discriminatory animus":

> "A close reading of Griffin leads this Court to conclude that the words 'class-based invidiously discriminatory animus' refer, at most, to that kind of irrational and odious class discrimination akin to racial bias -- such as discrimination based on national origin or religion. The complaint alleges no such discrimination."

The patent insufficiency, as a matter of law, of said second cause of action as alleged against defendant, Bank and Granirer, is further conclusively established by its very essence, to wit: the alleged conspiracy by defendants, Bank and Granirer, with defendants, the Commissioners of the BSA, a quasi-judicial or quasi-legislative body existing and functioning as a subdivision or agency of the City and State of New York. For, as such, it is not a person within the meaning of 42 U.S.C. sec. 1983 (Kenosha v. Bruno, 412 U.S.507), and its members are immune from prosecution in this action. And it is settled

that an action does not lie under the Civil Rights Act against private persons on the predicate of an alleged conspiracy by them with public officials who are themselves immune from an action thereunder.

In Hill v McClellan, 490 F.2d 859, in which plaintiff sued, pursuant to sections 1983 and 1985 of 42 U.S.C., charging a conspiracy by a state court judge, an attorney and a party to the state court action, it was held (p. 860):

> "A private person cannot be held liable under 42 U.S.C. sec. 1983 unless his wrongful conduct was done under color or state law of authority Further a private person alleged to have conspired with a state judge and attorney who are entitled to immunity cannot be held liable since he is not conspiring with persons acting under color of law against whom a valid claim could be stated (citing cases) - - There is no cause of action under the Civil Rights Act if a case is private litigation in which the state does no more than furnish the forms and has no interest in the outcome."

Same effect: Waits v McGowan, 516 F.2d 203.

Viewed in any light favorable to plaintiffs said second cause of action fails to state any cause of action, sufficient in law or equity, against defendants, Bank and Granirer, and, therefore, was justly and properly dismissed "with prejudice".

CONCLUSION

Not only is this action against defendants, Bank and Granirer "frivolous", as found and characterized in the opinion (p. 11) of the court below, but it is grossly irresponsible in its careless and cavalier indifference to the adjudications of the state courts whose

jurisdiction plaintiffs chose for the determination of their rights, to say nothing of the substantial expense with which plaintiffs have burdened defendants in this legally meritless and morally unjustifiable case.

THEREFORE, it is respectfully urged that plaintiffs be assessed with "double costs" and with the payment to defendants, Bank and Granirer, of their "attorneys' fees" herein.

Overmeyer v. Fidelity & Deposit Company of Maryland, et al. U.S. Ct. App., 2d Cir., Docket No 76-7566, decided May 3, 1977.

Respectfully submitted,

FREY & HARKOW,
Attorneys for Defendants-Appellants,
Richmond Hill Savings Bank and
Julius Granirer

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 21st day of JULY, 1977, deponent personally served the within BRIEF OF DEFENDANTS-APPELLEES, RICHMOND HILL SAVINGS BANK & JULIUS GRAWIRER upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

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Robert La Grassa

Sworn to before me this
21st day of July, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930808
Qualified in Queens County
Commission Expires March 30, 1979